LIBRARY

No. 73-539

FILED
NOV 20 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

AVONSIDE NURSING HOME, INC., PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-539

AVONSIDE NURSING HOME, INC., PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole issue presented is whether this suit was properly dismissed by the courts below for petitioner's failure to exhaust its administrative remedies.

Petitioner, Avonside Nursing Home, applied in 1966 to participate as an extended care facility in the Health Insurance for the Aged (Medicare) Program, 42 U.S.C. 1395, *et seq.* By agreement with the Secretary of Health, Education, and Welfare, Avonside became an approved "provider of services" in 1967, and on several occasions thereafter was reimbursed by the Department for services furnished Medicare beneficiaries. In 1970 the ownership of the corporate stock changed hands, but the corporation continued to do business as "Avonside Nursing Home" and took no steps to comply with 42 U.S.C. 1395cc(b)(1) which permits a provider of services to

terminate voluntarily its agreement by giving the public notice required by HEW regulations. The 1967 agreement, therefore, continued in full force and effect.

In October, 1971, the Secretary advised Avonside that its provider agreement was being terminated pursuant to 42 U.S.C. 1395cc(b)(2) because it no longer substantially met the conditions of participation prescribed for the Medicare Program. Avonside protested that the agreement had already been terminated as a result of the change of ownership of its corporate stock. The nursing home requested an administrative hearing, a hearing examiner was appointed, and a pre-hearing conference was held, at which the hearing examiner denied Avonside's request that he issue a subpoena *duces tecum* for certain records of the Department.[1] Immediately thereafter Avonside brought this suit for injunctive relief seeking a declaration that its provider of services agreement was a nullity, and an order restraining the Department from conducting administrative hearings which petitioner alleged would be prejudicial to its participation in state programs. The complaint alleged, among other things, that because of the hearing examiner's refusal to issue the requested subpoena, petitioner could not obtain a fair hearing. The district court held that petitioner had failed to exhaust its administrative remedies and dismissed the action. The court of appeals affirmed without opinion (Pet. App.).

---

[1]The subpoena would have required the appearance of the Director of the Bureau of Health Insurance of the Social Security Administration, and the production of all the records in the Bureau relating to waivers granted by any State or by the Bureau for facility deficiencies under Medicare.

The Medicare Act, 42 U.S.C. 1395ff(c), entitles an aggrieved provider of services to a hearing and to judicial review of the Secretary's determinations. However, the Act contemplates review only for a "final decision of the Secretary made after a hearing" pursuant to 42 U.S.C. 405(g), as is evidenced by 42 U.S.C. 405(h) which pertinently provides that "[n]o findings of fact or decisions of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided."

Since petitioner had a statutory right of administrative review, followed if necessary by judical review, which it had not exercised, the district court properly dismissed the suit for injunctive relief for failure to exhaust administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. All the issues raised in petitioner's complaint, including the Secretary's alleged lack of jurisdiction and the hearing examiner's refusal to issue the requested subpoena, should have been initially resolved at an administrative hearing. *Petroleum Exploration, Inc.* v. *Public Service Commission,* 304 U.S. 209; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp., supra.*

McKart v. *United States,* 395 U.S. 185, upon which petitioner relies for the proposition that exhaustion of remedies is not essential, is inapposite on its facts. That case, unlike the instant case, did not involve a premature resort to the courts where an administrative remedy was available. Indeed, the Court in *McKart* expressly noted that "all administrative remedies are now closed to petitioner" (395 U.S. at 196-197). Moreover, in *McKart* the Court pointed out that exhaustion of remedies is traditionally required where the relevant statute provides that certain administrative procedures

shall be exclusive, where it is necessary to permit the agency to develop the necessary factual background for a determination of the issues upon which a judicial decision must be based, and where the agency is entitled to exercise its expertise with respect to matters clearly within its jurisdiction (395 U.S. at 193-194). All of these factors are relevant here.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

---

[2]Petitioner's contention that the district court should have assumed jurisdiction under the Freedom of Information Act, 5 U.S.C. 552, was first raised in its petition for rehearing in the court of appeals. It is, in any event, without merit, since the suit was not brought to compel the production of documents requested under that Act. Although petitioner alleged that it would be unfair to conduct the hearing unless the subpoena *duces tecum* it had requested was issued, no request for documents under the Freedom of Information Act was ever made to the agency, and no claim that the Freedom of Information Act required the disclosure of the documents was made to the district court. Thus, this case does not involve the question of the district court's power to enjoin ongoing agency proceedings pending the determination of Freedom of Information Act claims which is before this Court in *The Renegotiation Board* v. *Bannercraft Clothing Company, et al.*, No 72-822, argued October 17, 1973.